MAJLIS AGAMA ISLAM PULAU PINANG & SEBERANG PERAI

v.

KATIJAH YOAN & ORS

HIGH COURT MALAYA, PENANG
SU GEOK YIAM J
[CIVIL SUIT NO: 22-116-1987]
22 DECEMBER 2009

ISLAMIC LAW: *Wakaf - Formation - Trust deed - Creation of perpetual Mohammadan Whakoff Endowment - Whether intention and terms clear and unequivocal - Whether subject land were indeed wakaf - Administration of Muslim Law Enactment 1959 [Penang], ss. 2, 89, 90*

ISLAMIC LAW: *Wakaf - Trusteeship - Trusteeship for wakaf and wakaf properties in State of Penang - Whether solely vested in plaintiff - Vesting of trusteeship to beneficiary/representative of Testator - Whether bad in law - Sale of wakaf land thereof - Whether null and void - Administration of Muslim Law Enactment 1959 [Penang], ss. 2, 89, 90*

LAND LAW: *Wakaf - Wakaf land - Indefeasibility of title - Whether principles of indefeasibility of title applicable to Wakaf land - Whether second defendant bona fide purchaser for value - National Land Code, s. 340(3)(b)*

CONTRACT: *Sale of land - Sale of wakaf land - Whether null and void - Defence - Waiver and estoppel - Whether waiver and estoppel operate against a statute*

By a Trust Deed dated 30 September 1901 ('the said Trust Deed'), one Seetee Aishah binti Haji Mahmood ('the Testator') had conveyed certain lands in Penang to her daughter and her issues or descendents for their use and to stand as a perpetual Mohammadan Whakoff Endowment ('Wakaf Property'). It was not in dispute that in so far as wakaf and wakaf properties in Penang were concerned, trusteeship thereof was, by virtue of the provisions of the Administration of Muslim Law Enactment 1959, State of Penang (the "Enactment"), solely vested in the plaintiff. That notwithstanding, sometime in 1974, without the plaintiff's knowledge and consent, one Mariam binti Che Wan ('Mariam') had applied for and obtained an *ex parte* order from the Penang High Court vesting the trusteeship of the Wakaf Property to her ('first *ex parte* order').

Subsequently, by another *ex parte* order obtained in 1982 ('second *ex parte* Order'), Mariam, however, surrendered the trusteeship to one Mohd Atan bin Mohamed ('Mohd Atan'). In the meanwhile, by a fatwa dated 8 May 1986, the Fatwa Committee of the State of Penang issued a ruling that the Wakaf Property did indeed constitute a valid wakaf in law, and that it would be 'haram' for the said lands to be sold, and if sold, the sale would be rendered null and void. Be that as it may, on 11 August 1986 and unknown to the plaintiff, Mohd Atan had obtained an *ex parte* order from the same court ('third *ex parte* order') permitting him to sell and dispose of the Wakaf Property – which he eventually did – to the second defendant – on 8 January 1987. Aggrieved, the plaintiff filed a claim against the first defendant personal representative of Mohd Atan, the second defendant purchaser of the Wakaf Property and the third defendant personal representative of Mariam – essentially to nullify the sale of the Wakaf Property to the second defendant. The second defendant *inter alia* raised the issues of indefeasibility of title, estoppel and waiver, and in any case, had filed a counter-claim against the plaintiff.

Held (allowing plaintiff's claim and dismissing second defendant's counterclaim):

(1) In view of the explicit terms used in the said Trust Deed and the clear and unequivocal declaration by the Testator in settling the said lands as a perpetual Mohammadan Whakoff Endowment, the court could not hold otherwise except that the said lands are indeed wakaf property (*G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang* (foll)). (paras 17, 18, 19, 24)

(2) As the said lands was a wakaf, s. 89 (2) of the Enactment which provides that "the Majlis shall be the sole Trustee of all Wakaf whether Wakaf Am or Wakaf Khas ...", applies. Furthermore, by virtue of the vesting provisions contained in s. 90 of the Enactment, the said lands, being situated in Penang, automatically vested in the plaintiff without the necessity to execute any conveyance, assignment or transfer for the purpose of the wakaf. (paras 29, 30 & 31)

(3) The first, second and third *ex parte* orders were null and void as the court had no power to grant them as the said lands had been vested in the plaintiff. In consequence, Mohd Atan had no legal capacity to sell and transfer the said lands to the second defendant. (para 32)

(4) The indefeasibility of title protection accorded by the proviso to s. 340(3)(b) of the National Land Code did not apply to wakaf land and consequently, the second defendant's title had become defeasible. In any event, the second defendant had failed to prove that it was a *bona fide* purchaser for value as anyone who had conducted a search on the titles to the said lands would have been aware of the existence of the said Trust Deed. Further no evidence was led by the second defendant that the full purchase price had been paid to Mohd Atan. Therefore, the second defendant's reliance on the proviso of s. 340(3)(b) of the NLC could not succeed. *G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang & Satu Yang Lain* (foll). (paras 37-39, 46-50)

(5) The second defendant had failed to prove waiver and/or estoppel. The plaintiff had no knowledge of the second defendant's proposed removal of its private caveat and thus could not be taken to have waived its rights to the said lands. Estoppel also did not apply based on the same reason. Further, the law as it stands does not allow waiver or estoppel to operate against a statute. There can also be no estoppel when considerations of public interest are involved. *Jalandhar Improvement Trust v. Sampuran Singh* (refd). (paras 52-57, 59)

(6) The second defendant had failed to discharge its burden of proof in respect of its counter-claim and to adduce any evidence, whatsoever, with regard to the quantum of loss which it had suffered arising from the alleged development project to be carried out on the said lands. *John v. Dharmaratnam* (refd); *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* (refd). (paras 60-63)

Case(s) referred to:

G Rethinasamy v. Majlis Ugama Islam, Pulau Pinang & Satu Lagi [1993] 2 CLJ 605 HC ***(foll)***

Jalandhar Improvement Trust v. Sampuran Singh [1999] 3 SCC 494 ***(refd)***

John v. Dharmaratnam [1961] 1 LNS 35 HC ***(refd)***

Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***

Legislation referred to:

Administration of Muslim Law Enactment 1959 (Penang), ss. 2(1), 89(1), (2), 90(1), (2), 105

National Land Code, ss. 4(1), (2)(e), 340(3)(b)

Other source(s) referred to:
Halsbury's Laws of India, Butterworth India, vol 15, para 140.012
Syed Ameer Ali, *Mohamedan Law,* vol 1, 4th edn, p 396

For the plaintiff - Abu Bakar As-Sidek Hj Mohd Sidek; M/s Ghazi & Lim
For the 2nd defendant - Thomas Lai (Tan Hong Kiat with him); M/s Sidek, Teoh, Wong & Dennis

Reported by Susheila Sreedharan & Wan Sharif Wan Ahmad

JUDGMENT

Su Geok Yiam J:

[1] In this civil suit which proceeded to full trial the court gave judgment upon its conclusion in favour of the plaintiff with costs and dismissed the 2nd defendant's counter-claim with costs (the "said decision").

[2] The 2nd defendant is dissatisfied with the said decision and has filed a notice of appeal to the Court of Appeal.

[3] Below are the reasons why the court made the said decision.

Facts And Background

[4] Firstly, the court shall deal briefly with the facts and background of the plaintiff's claim.

[5] By a trustee deed contained in a Deed Poll dated 30 September 1901 which was registered in the Registry of Deeds Settlement of Penang (the "said Trust Deed") which was registered in the Land Office (Registered No. 163 in Volume 85) one Seetee Aishah binti Haji Mahmood (the "Testator") conveyed five lots of lands and hereditaments known as Lot 200, Lots 1441 and 1442 (formerly known as Lot 251), Lot 252 and Lot 1119 (formerly known as Lot 429 (2), Mukim 4, Province Wellesley Central (the "said lands") unto her daughter, namely, Saeedah Noordin (since deceased) and to her children, grand children, great grand children and their issues or descendents and to hold the said lands unto and for the use of Saeedah's children, grand children, great grand children and their issue or descendants for ever upon trust intents and purposes expressed therein and to stand seized of as a perpetual Mohamadan Wakoff Endowment (Wakoff property) and subject to certain intents and purposes, *inter alia*, as follows:

(a) to make once in every year a ceremonial kundooree Houl for her soul (Seetee Aishah's soul) after her death;

(b) for the soul of her father, Haji Mahmood, her mother, Aminah and her brother, Abdullah in the month of Ramadhan (bulan puasa);

(c) to pay $3 for ceremonial Ratib prayers three times a year at her grave namely:

- firstly on the day of kundooree Houl;
- secondly holiday for Hari Raya Puasa;
- thirdly holiday of Raya Haji.

(d) further, to pay and supply one tin of kerosene oil for the mosque of Permatang Pauh during the month of Ramadhan yearly;

(e) to remit to Mecca $3 yearly for the purposes of Umrah; and

(f) out of the balance of the rent and income collected one half of the same shall be spent for repairs to the Permatang Pauh mosque and in the event there are no repairs to the said mosque, the same should be remitted to Mecca for Wakaf or other charitable purposes and the other one half shall be taken and used by the said Saeedah and her descendants for their use and benefit absolutely.

[6] Subsequently, on 1 January 1906, the Muslim and Hindu Ordinance 1906 came into force ("the Ordinance"). The Ordinance was later repealed by the Administration of Muslim Law Enactment 1959 ("the Enactment"). The Enactment which is applicable to the state of Penang came into force on 1 January 1967 by virtue of PU 6/67.

[7] Section 89(2) of the Enactment expressly provides that the plaintiff shall be the sole Trustee of all Wakaf. Section 90(1) of the Enactment expressly provides that all property subject to the provisions of s. 89 shall if situate in the state vest in the plaintiff without any conveyance, assignment or transfer whatsoever for the purpose of the Bait-ul-Mal, Trust, Wakaf or Nazr'am affecting the same.

A **[8]** Sometime in the year 1973, without the knowledge of the plaintiff and/or its consent, one Mariam binti Che Wan (the "said Mariam binti Che Wan") made an application in the High Court of Malaya at Penang by way of an *ex parte* Originating Summons No. 412 of 1973 and obtained an *ex parte* order thereon dated B 6 September 1974 (the "1st *ex parte* order") whereby the said lands be vested in her name as trustee.

[9] Some five years later, in 1978, also without the knowledge and/or consent of the plaintiff, the said Mariam binti Che Wan C again made an application in the High Court of Malaya at Penang by way of an *ex parte* Originating Summons No. 49 of 1978, and obtained an *ex parte* order dated 26 February 1982 (the "2nd *ex parte* order") to vest the said lands in the name of one Mohd Atan bin Mohamed (the said "Mohd Atan bin Mohamed") as trustee and the D said Mariam binti Che Wan was permitted to retire as a trustee from the trust.

[10] Some eight years later, in 1986, again without the knowledge and/or consent of the plaintiff, the said Mohd. Atan bin Mohamed made an application in the High Court of Malaya at Penang by E way of an *ex parte* Originating Summons No. 31-484-86 and obtained an *ex parte* order dated 11 August 1986 (the "3rd *ex parte* order") to dispose off the said lands on terms and conditions referred to in the 3rd *ex parte* order.

F **[11]** A year later, in 1987, the said Mohd Atan bin Mohamed again without the knowledge and consent of the plaintiff transferred the said lands to the 2nd defendant. The transfer was registered on 8 January 1987 in the Registry of Land Titles, Penang despite the provisions of the trust deed stating that the lands were Wakoff G property.

[12] In the same year, the plaintiff filed its claim against the 1st, 2nd and 3rd defendants pursuant to s. 89 and s. 90(1) of the Enactment. The 2nd defendant then filed its statement of defence H and counter-claim. Subsequently, the 2nd defendant amended its statement of defence. The plaintiff then filed its reply to the 2nd defendant's amended statement of defence and also its statement of defence to the 2nd defendant's counter-claim.

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[13] On 24 May 2004, the 1st defendant being the personal representative of the said Mohd Atan bin Mohamed, deceased and the 3rd defendant being the personal representative of the said Mariam binti Che Wan, deceased, entered into a consent order (the "said consent order") with the plaintiff in which it was adjudged that the 1st, 2nd and 3rd *ex parte* orders be set aside and all transactions thereto be also set aside and the entries in the land office be expunged and the said lands be vested in the name of the plaintiff as the sole trustee of all Wakaf lands in Penang subject to the other terms and conditions referred to in the said consent order.

[14] In the trial, the plaintiff called three witnesses. They are SP1, Dato' Haji Hassan bin Haji Ahmad, the Mufti of the State of Penang, SP2, Encik Fakhruddin bin Abd. Rahman, the Unit Head of the Wakaf Division of the Majlis Agama Islam Negeri Pulau Pinang, and SP3, Encik Wahi Annuar bin Othman, an Assistant Administrative officer in the Lands and Mines Office of Penang.

[15] The 2nd defendant called one witness. He is SD1, Mr. Lim King Hwa, a director of the 2nd defendant.

Issues For The Determination Of The Court

[16] The parties have raised four issues for the determination of the court. They are as follows:

(1) whether the said lands are Wakaf property pursuant to the trust deed?

(2) whether the said Mohd Atan bin Mohamed had the legal capacity to sell and transfer the said lands to the 2nd defendant despite the terms of the trust deed and s. 89(2) and s. 90(1) of the Enactment?

(3) whether the 2nd defendant is a *bona fide* purchaser for value for the said lands and able to rely on the 1st, 2nd and 3rd *ex parte* orders and the provisions of the National Land Code 1965 (the "NLC"), in particular, the proviso to s. 340(3)(b) as regards indefeasibility of title in order to protect its interest in the said lands from the plaintiff's claim?

(4) whether there is any waiver on the part of the plaintiff and/or whether estoppel can operate against the plaintiff on the facts of the case?

A **1st Issue: Whether The Said Lands Are Wakaf Property Pursuant To The Said Trust Deed?**

[17] The court was satisfied that based on the said trust deed and its registration at the Land Office of Penang as a trust deed the
B said lands are Wakaf property pursuant to s. 89(2), s. 90(1) and s. 90(2) of the Enactment.

[18] The terms of the trust deed are clearly worded in that the Testator had conveyed the said lands as a perpetual Mohammadan Whakoff Endowment upon the express terms stated in the trust
C deed.

[19] Therefore, the said lands are Wakaf property by virtue of the express dedication of the Testator in the trust deed. This finding is supported by the views expressed by Abdul Hamid bin Mohamed, J
D (as His Lordship then was) in the case of *G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang & Satu Lagi* [1993] 2 CLJ 605. In that case the learned judge had referred to various Islamic authorities and decisions in respect of the creation of Wakaf where a property may be considered as Wakaf property either by express dedication or
E by use, ie, if the said property had been used over time for religious purposes. At p. 615, the learned judge refers to the book *"Mohamedan Law"*, vol. 1, 4th edn, by Syed Ameer Ali at p. 396 and states as follows:

F > Dalam buku bertajuk Mohamedan Law Jilid 1 (edisi keempat) oleh Syed Ameer Ali, pada halaman 396, terdapat petikan berikut:
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> Where effect has once been given to a dedication in the mode which is natural to the particular dedication, the wakaf is complete and irrevocable.

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[20] Furthermore, in referring to Indian authorities, the learned judge had ruled that Wakaf could arise either by express dedication or through use over time for religious purpose. He said as follows at p. 615:

H > Dalam kes *Mohammad Shah v. Fasihuddin Ansari & Ors*., keputusan Mahkamah Agung India, terdapat petikan berikut, pada halaman 714:
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> As a matter of law a wakf normally requires express dedication but
I > if land has been used from time immemorial for a religious purpose then the land is by user wakf although there is no evidence of an express dedication.

[21] The evidence of the plaintiff's witnesses as regards the issue of Wakaf was not disputed nor rebutted by the 2nd defendant who did not call any other witness to dispute the views of SP1, Dato' Haji Hassan bin Haji Ahmad, the Mufti of the State of Penang. The court, therefore, accepted his expert evidence. In his evidence, SP1 had explained the meaning of a perpetual Mohammadan Whakoff Endowment and he also confirmed that Wakaf property cannot be sold. He said as follows:

> Maksudnya ialah Wakaf tersebut adalah kekal buat selama-lamanya. Ini adalah hukum Wakaf seperti yang dinyatakan di dalam Hasyiah, I'anatul At-Talibin, Juz Ketiga di Halaman 167 karangan As-Syed Al-Bakri, Maksudnya: Dan tidak batal Wakaf setiap keadaan malah adalah berterusan.
>
> Harta Wakaf tidak boleh dimiliki oleh sesiapa kerana ianya berpindah kepada Allah. Kenyataan ini adalah berpandukan kitab Mughni Muhtaj karangan Muhammad Khatib As-Syarbini Juz Kedua. Dar Al-Fikir Halaman 389:
>
> Maksudnya: Pendapat Al-Azhar bahawa pemilikan harta yang diwakaf berpindah kepada Allah yakni tertanggal dari ikhtisas manusia, oleh yang demikian maka tidaklah ia milik pewakaf dan tidak pula milik penerima wakaf, tetapi segala manfaatnya adalah milik penerima Wakaf.
>
> Wakaf tidak boleh dijual beli. Ini seperti yang dinyatakan oleh Hadis Nabi yang ada dinyatakan oleh Doktor Wahbah Az-Zuhaili, di dalam Kitabnya Al-Fiqh Al-lslami Wa Adillatuhu Juz Kelapan 155, Bermaksud: Bahawa Umar R.A. memperolehi sebidang tanah di Khaibar lalu ia berkata Wahai Rasulullah: Saya telah memperolehi sebidang tanah di Khaibar yang mana saya tidak pernah memperolehi mana-mana harta terlebih berharga daripadanya di sisi saya, maka apa perintah mu kepada saya mengenainya? Jawab Rasulullah:
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> "Jika engkau mahu, engkau tahankannya dan wakafkannya" lalu Umar mewakafkannya untuk orang-orang fakir, kaum kerabat, hamba yang hendak memerdekakan dirinya, orang-orang dhaif dan orang-orang musafir atau hendak memulakan perjalanan (Safar), dengan syarat tanah wakaf itu tidak boleh dijual beli, tidak boleh diberi secara percuma (Hibah) dan tidak boleh diwarisi ...

[22] SP1 is also the Chairman of the Fatwa Committee of the State of Penang. In that capacity he had also stated that the Syariah Committee of the Majlis Ugama Islam Pulau Pinang had issued a "Fatwa", P2, pertaining to the said lands. The "Fatwa" states *inter alia*, as follows:

A

3.1.1. Ahli-Ahli telah membincangkan perkara ini dengan panjang lebar dan telah bersetuju memberi keputusan kepada soalan itu seperti berikut:

ii. Tidak boleh dilakukan pembahagian unit-unit rumah mengikut nisbah tertentu di antara Pemegang Amanah dengan pemaju yang mana pada pendapat Jawatankuasa ini pihak pemaju akan menjual bahagian tersebut. Hukum penjualan harta Wakaf adalah haram.

B

iii. Jika Pemegang Amanah menyeleweng daripada aturan syarak, maka bolehlah pihak Majlis Agama menahan dan seterusnya berkuasa di atas tanah itu.

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[23] The "Fatwa" was issued on 8 May 1986. SP1 had confirmed that as a result of the "Fatwa" ruling, the said lands are Wakaf property and that according to Syariah Laws it would be "Haram" for the said lands to be sold and if sold, the sale would be rendered null and void.

D

[24] In view of the explicit terms used in the said trust deed and the clear and unequivocal declaration by the said Testator, Seetee Aishah binti Haji Mahmood, in settling the said lands as a perpetual Mohammadan Whakoff Endowment, the court could not hold otherwise except that the said lands are indeed Wakaf property.

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[25] This view of the court is fortified by the definition of "Wakaf" in s. 2(1) of the Enactment where "Wakaf" is defined to mean either "Wakaf Am" or "Wakaf Khas".

F

[26] Section 2(1) of the Enactment provides as follows:

"Wakaf Am" means a dedication in perpetuity of the capital and income of property for religious or charitable purposed recognized by Muslim Law and the property so dedicated;

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"Wakaf Khas" means a dedication in perpetuity of the capital of property for religious or charitable purposes recognized by Muslim Law and the property so dedicated, the income of the property being paid to persons or for purposes prescribed in the Wakaf.

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[27] The court accepted the explanation given by SP1 and is, accordingly, of the considered view that the terms of the trust deed are clear in that the property is conveyed and settled to the trustee to hold the said lands upon the trust's intents and purpose as

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expressed as a perpetual Mohammadan Whakoff Endowment. The said Testator, Seetee Aishah, had given directions that the income from the rents of the said lands would be used for "Amal Jariah" and "Ibadah" purposes in accordance with the trust deed every year. These purposes are religious and charitable purposes based on the evidence of SP1 given in cross-examination which was accepted by the court.

[28] On the meaning of "Amal Jariah", SP1 had stated as follows:

> "Amal Jariah" adalah amalan yang berterusan. Apabila seseorang membuat Wakaf dia akan dapat pahala daripada Wakaf tersebut sehingga hari Kiamat.

2nd Issue: Whether The Said Mohd Atan bin Mohamed Had The Legal Capacity To Sell And Transfer The Said Lands To The 2nd Defendant Despite The Terms Of The Said Trust Deed And The Provisions Of s. 89(2) And s. 90(1) Of The Enactment?

[29] Section 89(2) and s. 90(1) and (2) of the Enactment expressly provide as follows:

> **Section 89(2)** Notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting the same, the Majlis shall be the sole trustee of all wakaf, whether wakaf "am or wakaf khas, of all nazr 'am, and of all trusts of every description creating any charitable trust for the support and promotion of the Muslim Religion or for the benefit of Muslims in accordance with Muslim law to the extent of any property affected thereby and situate in the State land, where the settler or other person creating the trust, wakaf or nazr 'am was domiciled in the State to the extent of all property affected thereby wherever situate.
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> **Section 90(1)** All property subject to the provisions of the preceding section shall if situate in the State vest in the Majlis, without any conveyance, assignment, or transfer whatever, for the purpose of the Bait-ul-Mal, trust, wakaf or nazr 'am affecting the same.
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> **Section 90(2)** The Majlis shall take all necessary steps to vest in itself for the like purposes any such property situate elsewhere than in the State.

[30] Having ruled that the said lands are indeed Wakaf property based upon a proper interpretation and construction of the words and expressions used in the trust deed by the Testator, the court is of the considered view that s. 89(2) of the Enactment comes into play. The section clearly provides that "the Majlis shall be the sole trustee of all Wakaf whether Wakaf Am or Wakaf Khas ... and of all trusts of every description creating any charitable trust for the support and promotion of the Muslim religion or for the benefit of Muslims in accordance with Muslim Law to the extent of any property affected thereby and situate in the State ..."

[31] Furthermore, by virtue of the vesting provisions contained in s. 90 of the Enactment, the said lands which are situated in Penang shall automatically vest in the plaintiff without the necessity to execute any conveyance, assignment or transfer whatever for the purpose of the Wakaf.

[32] The court is of the considered view that by virtue of the statutory provisions concerning automatic vesting contained in s. 90(1) of the Enactment which came into force on 1 January 1967, the 1st, 2nd and 3rd *ex parte* orders dated 6 September 1974, 26 February 1982 and 11 August 1986, respectively are null and void having been irregularly obtained because the court clearly had no power to grant them as the said lands had already vested in the plaintiff on 1 January 1967. It follows, therefore, the said Mohd Atan bin Mohamed had no legal capacity whatsoever to sell and transfer the said lands to the 3rd defendant.

[33] It was on this ground that the 3rd *ex parte* order which was anchored on the 2nd *ex parte* order was, subsequently, set aside by way of the consent order dated 24 May 2004.

[34] In respect of the 1st *ex parte* order which was obtained by Mariam bt Che Wan, the court was similarly of the view that it was irregular because the court could not have vested the said lands in the name of Mariam bt Che Wan by virtue of the legal impediment contained in s. 90(1) of the Enactment.

[35] The same applies to the 2nd *ex parte* order for the change of the name of the Trustee of the said trust deed from Mariam bt. Che Wan to Mohd Atan bin Mohamad because that order is similarly caught by s. 90(1) of the Enactment.

3rd Issue: Whether The 2nd Defendant Is A *Bonafide* Purchaser For Value For The Said Lands And Able To Rely On The 1st, 2nd And 3rd *Ex parte* Orders Obtained And The Provisions Of The National Land Code 1965 (The "NLC"), In Particular, The Proviso To s. 340(3)(b) As Regards Indefeasibility Of Title In Order To Protect Its Interest In The Said Lands From The Plaintiff's Claim?

[36] In order to answer the 3rd issue the court has to determine the following two issues:

(a) whether the NLC is applicable to Wakaf land?

(b) whether the 2nd defendant has fulfilled the conditions as stipulated in s. 340 of the NLC ie, that it is a *bona fide* purchaser for value so that the 2nd defendant's title to the said lands is entitled to the protection under the proviso contained in s. 340(3)(b) of the NLC as interpreted by the courts in a number of judicial pronouncements thereto?

[37] Having heard the parties the court is of the considered view that the indefeasibility of title protection accorded by the proviso to s. 340(3)(b) of the NLC does not apply to wakaf land and that, consequently, the 2nd defendant's title has become defeasible.

[38] The reasons of the court are as follows:

Issue (a): Whether The NLC Applies To Wakaf Land?

[39] The NLC has specifically excluded wakaf land from its ambit by virtue of the clear wording used in s. 4(1) and (2)(e) of the NLC.

[40] Section 4(1) and (2)(e) of the NLC provide as follows:

> 4. Savings
>
> (1) Nothing in this Act shall effect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act.
>
> Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided, be subject to the provisions of this Act.

A (2) Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of ...

(e) any law of the time being in force relating to Wakaf or bait-ul-mal.

B **[41]** Based on this interpretation and construction of s. 4(1) and (2) of the NLC the 2nd defendant's title to the said lands is not indefeasible and the 2nd defendant cannot rely on the proviso in s. 340(3)(b) to protect its title from being defeated by the higher right and interest in the said lands conferred by s. 90(1) of the C Enactment on the plaintiff.

[42] This view of the court is again fortified by the judicial pronouncements of Abdul Hamid bin Mohamed, J (as His Lordship then was) in the case of *G. Rethinasamy v. Majlis Ugama Islam, Pulau Pinang & Satu Lagi, supra*. In that case one of the issues D which arose for the determination of the court was whether s. 105 of the Enactment was applicable in vesting upon the defendant ie, the Majlis Ugama Islam Pulau Pinang, the lands in dispute so as to defeat the plaintiff's title to it thereby rendering the plaintiff's E title defeasible. His Lordship held as follows in the headnotes:

(3) Section 105 of the Enactment applies whether the land is "wakaf" land or otherwise, provided: (a) there was a mosque or something related to it or used for its purpose on the land, and (b) the land is not state land. The defendants need not prove that the F land was "wakaf" land in order to get the benefit under Section 105. Part A, therefore, was vested in the first defendant. The plaintiff's title to part A was defeasible.

(4) The defendants were able to prove that part A was "wakaf" land by user and the land was not subject to the National Land G Code 1965. That part did not belong to LKC and LKC could not sell it to the plaintiff. The land administrator too had no power to vest that part in the plaintiff.

[43] His Lordship also decided that in relation to Wakaf land H s. 340 of the NLC would not afford protection because there is no express provision in the NLC which confers such a protection on wakaf land as provided for in s. 4(2)(e) of the NLC. He said as follows at p. 615 of his judgment:

I

(c) Wakaf

Seksyen 4(2) Kanun itu, antara lain, memperuntukkan:

> (2) Except in so far is expressly provided to the contrary, nothing in this Act shall effect the provision of
>
> …
>
> (e) any law for the time being in force relating to wakaf or baitulmal.

Ini bererti, jika bahagian A itu tanah wakaf, peruntukan Kanun itu, melainkan jika diperuntukkan sebaliknya dengan nyata (tidak ada peruntukan sedemikian), tidak terpakai. Ini, pada pandangan saya, termasuklah peruntukkan s. 340 itu.

[44] Further, p. 619 of his judgment, His Lordship again emphasized that the provisions of s. 4(2)(e) of the NLC would clearly defeat the title of the registered proprietor by virtue of the provisions of the Enactment. The land owner had purportedly sold the land in dispute to one Dr. Leong. Dr. Leong, in turn, purportedly sold the land in dispute to the plaintiff. His Lordship said as follows:

> Kesimpulannya, saya berpuashati, atas imbangan kemungkinan berdasarkan keterangan dan autoriti-autoriti yang dikemukakan, defendan-defendan telah berjaya membuktikan bahawa bahagian A itu adalah tanah wakaf melalui penggunaan (wakaf by user). Oleh itu bahagian itu tidak tertakluk kepada peruntukan Kanun itu. Saya berpendapat demikian kerana peruntukan Seksyen 4 (2)(e) Kanun itu. Jika, sebagaimana yang saya putuskan, bahagian A itu tanah wakaf, ia bukan lagi milik Dr. Leong (tuan punya sebelum plaintif) dan Dr. Leong tidak boleh menjualnya kepada plaintif. Pentadbir tanah juga tidak berkuasa meletakhak bahagian itu kepada plaintif.

[45] The reason is because the land being wakaf land it ceased to be the property of the land owner by virtue of the statutory provision of the Enactment. Consequently, since Dr. Leong did not have the legal capacity to sell the land in dispute to the plaintiff, the Land Administrator, too, had no power to vest the lands in dispute in the name of the plaintiff.

[46] Having ruled in favour of the plaintiff with regard to issue (a) ie, that the proviso to s. 340(3)(b) of the NLC does not apply to wakaf land the court is of the considered view that issue (b) does not arise. Be that as it may, assuming that the court is wrong to so rule, the court will deal with issue (b).

Issue (b): Whether The 2nd Defendant Has Fulfilled The Conditions Contained In The Proviso To s. 340(3)(b) Of The NLC And The Judicial Pronouncements Thereto Ie, That It Is A *Bona Fide* Purchaser For Value So As To Be Entitled To The Protection Thereunder?

[47] The court is satisfied that based on the evidence adduced before the court the 2nd defendant has failed to prove on the balance of probabilities that it is a *bona fide* purchaser for value.

[48] The reasons are as follows:

[49] SD1, Mr. Lim King Hwa, who is the only witness for the 2nd defendant had admitted that he had prior knowledge of the three *ex parte* orders before the company entered into the sale and purchase agreement with the said Mohd Atan bin Mohamad. All the three *ex parte* orders contained references to the said trust deed. As a prudent purchaser represented by solicitors at all material times in respect of the transaction and the sale and purchase agreement the 2nd defendant would have knowledge and notice of the plaintiff's right to the said lands by virtue of the provisions of the said trust deed, the "Fatwa" which was issued on 8 May 1986, the Enactment and s. 4(2)(e) of the NLC.

[50] SD1 also said that he was the one who did the searches at the Land Office. He had passed the searches to his solicitors. Although SD1 had explained that he had conducted only a "layman's search" and he did not know of the existence of the said trust deed the court did not believe him. The reason is because the plaintiff's 3rd witness, SP3, Encik Wahi Annuar bin Othman, the Assistant Administrative Officer in the Land & Mines Department of the State of Penang had confirmed that the said trust deed was kept and registered in the Land Office. SP3 had identified "exh. P1" as the said trust deed. SP3 had also confirmed that the said trust deed was still in existence and had never been deleted from the document of title in the Land Office. What is significant is SP3's confirmation that if a search was done on the day he testified in court, it would still reveal the existence of the said trust deed affecting the said lands.

[51] The court found SP3 to be a truthful and reliable witness. Unlike SD1, SP3 had no interest in the case before the court. He was an independent witness. The court believed and accepted his evidence. Based on SP3's evidence the court concluded that anyone

including SD1 who had conducted a search on the titles to the said lands would be aware of the existence of the said trust deed. The 2nd defendant had also retained solicitors to act for the company and it is clearly the duty and responsibility of the solicitors to conduct a search on the titles to the said lands. If they had done so they would have detected the said trust deed. Furthermore, no evidence was led by the 2nd defendant that he had said the full purchase price which represented the market value of the said lands at the material time to the said Mohd Atan bin Mohamad. Therefore, the 2nd defendant's reliance on the proviso of s. 340(3)(b) of the NLC could not succeed.

4th Issue: Whether There Is Waiver On The Part Of The Plaintiff And/Or Whether Estoppel Can Operate Against The Plaintiff On The Facts Of The Case?

[52] The court was of the considered view that the answer to the 4th issue is "No".

[53] The reasons are as follows:

[54] Firstly, based on the evidence adduced by the 2nd defendant, the 2nd defendant has failed to prove waiver and/or estoppel on a balance of probabilities. This is because the evidence of SP3 which was believed and accepted by the court clearly supported the plaintiff's case that it had no notice of the removal of its private caveat on 27 May 1986. The 2nd defendant had alleged that the plaintiff was aware of the 2nd defendant's application for the removal of the plaintiff's private caveat, "exh. D11" ("the said application") but chose to do nothing about it. SP3 had testified that the land office did not inform the plaintiff of the said application. SP3 also testified that the land office did not issue to the plaintiff a notice to show cause why the plaintiff's private caveat ought not to be removed. SP3 further testified that the private caveat of the plaintiff was removed by the land office on the basis of a court order.

[55] SP3's evidence is reproduced below:

Question : Adakah pemotongan ini disebabkan oleh Borang 9 yang dirujuk?

Answer : Tidak.

A Question : Selepas Borang 9 (Exhibit D11) didaftarkan Pejabat Tanah akan memaklumkan P1 @ MAIPP berkenaan dengan permohonan pemotongan kaveat persendirian tersebut?

Answer : Tidak.

B

Question : Adakah Pejabat tanah minta plaintif untuk memberi tunjuk sebab kenapa kaveat persendirian tersebut harus dipotong?

Answer : Tidak.

C

Question : Encik Wahi tolong jelaskan kaveat persendirian telah dibatalkan pada 27.5.1986?

Answer : Kaveat persendirian telah dibatalkan kerana terdapat perintah mahkamah.

D

[56] Therefore, the court was satisfied that based on the evidence adduced before the court, the plaintiff had no knowledge whatsoever of the proposed removal of its private caveat by the 2nd defendant and as such could not be taken to have waived its rights to the said E lands. Estoppel also did not apply based on the same reason.

[57] Secondly, even assuming that the 2nd defendant was successful in proving waiver or estoppel the law as it stands does not allow waiver or estoppel to operate against a statute. The F provisions contained in s. 89(1) and s. 90(1) of the Enactment are clearly statutory in nature.

[58] As stated earlier, s. 89(1) of the Enactment expressly vests any Wakaf property in the name of the plaintiff. This provision is followed by s. 90(1) of the Enactment which expressly provides that G all property subject to the provisions of s. 89 which is situated in the State of Penang shall vest automatically in the name of the plaintiff without any conveyance assignment or transfer whatever for the purpose of the Wakaf affecting the same.

H **[59]** Similarly there can be no estoppel when considerations of public interest are involved. (See para 140.012 of *Halsbury's Laws of India*, vol 15 (Butterworth India) and the case of *Jalandhar Improvement Trust v. Sampuran Singh* [1999] 3 SCC 494.).

I **[60]** Thirdly, with regard to the 2nd defendant's counter-claim which is founded on negligence as a cause of action the court is satisfied that the 2nd defendant has failed to prove on the balance

of probabilities its allegation of negligence against the plaintiff in allowing its private caveat to be removed. As stated earlier the court believed and accepted the evidence of SP3 that the land office neither informed the plaintiff of the said application nor gave the plaintiff a notice to show cause why the plaintiff's private caveat ought not to be removed before removing the plaintiff's caveat based on a court order.

[61] Fourthly, the 2nd defendant failed to prove its claim for damages. It is trite law that he who brings an action for damages must prove their damages. The 2nd defendant failed to adduce any evidence, whatsoever, with regard to the quantum of loss which it has suffered arising from the alleged development project to be carried out on the said lands.

[62] In the case of *John v. Dharmaratnam* [1961] 1 LNS 35 the Court of Appeal in dealing with a claim for damages stated as follows:

> My attention has been drawn to a passage from the Judgment of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd*. which to me appears to be very apt in the circumstances of the present case where the Learned Lord Chief Justice said:
>
> > On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars and, so to speak, throw them at the head of the Court, saying: This is what I have lost; I ask you to give me these damages. They have to prove it.

[63] Therefore, it is clear that the 2nd defendant has failed to discharge its burden of proof in respect of its counter-claim. (See the case of *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116.)

[64] In the premises the court allowed the plaintiff's claim with costs and dismissed the 2nd defendant's counter-claim with costs.